(11)

No. 90-1102

In The

Supreme Court of the United States

October Term, 1990

ROBERT E. GIBSON,

Petitioner,

v.

THE FLORIDA BAR, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENTS

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SUMMARY OF ARGUMENT

This Court has not imposed an inflexible standard for the administration of compulsory dues and agency fees use. In *Abood, Ellis* and *Hudson* the Court acknowledged that organizations could experiment with different approaches to meet their particular circumstances so long as the dues payer's rights were adequately protected. The Florida Bar does not intentionally budget for nonchargeable uses as a matter of policy. While particular dues uses might ultimately be found to be nonchargeable, there is no way to know prior to dues collection what the number of such uses will be or the proportion of the dues dollar such uses will constitute. An advance reduction scheme would necessarily be based upon arbitrary calculations. The Florida Bar's system, which escrows 100% of an objector's pro rata share of the entire legislative budget and pays interest from the date the member's dues were received, fully protects the member's constitutional interests and is a more practicable approach to the realities of The Florida Bar's budget process and programming.

The advance reduction issue is not grounded on any recognized constitutional principle. This Court's expressed concern has been with the *"compulsory subsidization of ideological activity"*. In the absence of a due process or equal protection claim or some other special "burden" on the exercise of free speech, the Court has not heretofore recognized that collection alone implicates constitutional rights. The Florida Bar's escrow procedure fully protects an objecting member from *use* of his or her dues for nonchargeable purposes. The petitioner's challenge is erroneously directed at the collection rather than the expenditure stage of the dues process.

The Florida Bar's objection procedure requires an objecting member to indicate only which issues he or she believes to be nongermane to an integrated Bar's constitutionally justified purpose and thus nonchargeable. The member does not have to disclose his or her ideological position regarding the issue or activity in question. Consequently, the procedure is not analogous to the procedures declared unconstitutional in the anonymous association cases.

The Florida Bar objection procedure places no greater monitoring burden on members than would an advance reduction system since, under such a system, a member would still have to monitor all positions to determine whether he or she agreed with the Bar's designation of an activity as chargeable or nonchargeable.

The "standing objection to all nonchargeable exactions" which petitioner desires presumes, like advance reduction, that proper designation of a particular activity as chargeable or nonchargeable is readily apparent. Most activities, particularly those in the legislative arena, which are the ones challenged in this action, are likely to fall between the extremes so that their designation as chargeable or nonchargeable will be fairly debatable. The requirement that an objecting member indicate which activities or issues he or she believes to be nonchargeable is a reasonable obligation which sets in motion the process to resolve such questions.

A "standing objection to all nonchargeable exactions" would be tantamount to no objection at all. It

would leave the Bar with the unreasonable alternative of automatically returning 100% of the objecting member's pro rata share of the legislative budget, thereby resurrecting the "free rider" problem, or sending every issue to expensive arbitration.

The Florida Bar is mandated by Florida Supreme Court rule to provide every member with detailed notice of *all* budget items at each step of the budget making process. In addition, the membership is given notice of every legislative position taken by the Bar within a reasonably short time after the Board of Governors of the Bar votes on the issue. The budget is not broken down into chargeable and nonchargeable categories or the percentage allocated to each because that information is not known to the Bar at the time the budget is adopted or at the time dues are collected and, given the nature of the legislative process, cannot be known. However, the member, who is given as much information as the Bar itself has, is able to reach his or her own judgment regarding chargeability and file objections accordingly.

ARGUMENT

I. THE FLORIDA BAR'S ESCROW PROCEDURE IS A CONSTITUTIONAL ALTERNATIVE TO ADVANCE REDUCTION AND IS MORE WORKABLE UNDER THE FLORIDA BAR'S BUDGET SYSTEM AND PROGRAMMING

In response to this Court's decision in *Chicago Teacher's Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), The Florida Bar acted expeditiously to bring its rules into

conformity with the procedures laid out in that case.[1] The Bar found that the advance reduction scheme utilized by the union in *Hudson* was not practicable in light of the Bar's budget practices. Instead, the Bar adopted a procedure which requires escrow of the "pro rata share of an objecting member's dues at issue" upon the filing of an objection to a legislative position. In administering its rule, the Bar makes a 100% escrow of each dissenting member's pro rate share of the entire legislative[2] budget. The petitioner asserts that advance reduction is always necessary to meet minimal constitutional standards. In support of its position the petitioner seizes upon this Court's statement in *Hudson* that:

> The appropriately justified advance reduction and the prompt, impartial decisionmaker are necessary to minimize both the impingement and the burden.

Id. at 309. The statement is read out of context by petitioner. The necessity or lack of necessity for an advance reduction was not an issue in *Hudson* because the union in that case had chosen to utilize an advance reduction. The union in *Hudson* had argued that its advance reduction alone was sufficient to meet constitutional standards.

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[1] The delay in adoption of Florida's new procedures, referred to in petitioner's brief, was caused by Florida Supreme Court rules designed to assure that all members would have an opportunity to be heard before major rules revisions.

[2] The Florida Bar recognizes that its *Abood* obligations are not limited to legislative expenditures. However, the uses now challenged by the petitioners are all legislative and non-legislative expenditures have not been made an issue in this case.

This Court held that *even* the advance reduction was insufficient because the union procedures did not provide for nonmembers to be given adequate information to justify the calculation of the advance reduction and did not provide for an impartial decisionmaker. Thus, the quote relied on by petitioner did not require that there be an advance reduction, but that when an advance reduction is used, it be "appropriately justified" by adequate information.

The *Hudson* decision delineated only three constitutional requisites for the use of compulsory dues for ideological purposes:

> We hold today that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

Id. at 202. Nowhere in the opinion is there a requirement for an escrow *and* an advance reduction. Nevertheless, the circuits have split evenly on the question of whether advance reduction is a constitutional necessity. See *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987); *Grunwald v. San Bernardino School Dist.*, 917 F.2d 1223 (9th Cir. 1990) [holding or suggesting advance reduction necessary] and *Andrews v. Education Association of Cheshire*, 829 F.2d 335 (2d Cir. 1987); *Hohe v. Casey*, 868 F.2d 69 (3d Cir. 1989); *Crawford v. Air Line Pilots Ass'n Intern.*, 870 F.2d 155 (4th Cir. 1989) [holding or suggesting advance

reduction not necessary].[3] Petitioner now seeks resolution of the conflict. A careful analysis of the issue illustrates that while advance reduction is workable and appropriate in some circumstances, it is inherently unworkable in others, including those existent in Florida.

There are two practical problems with the premise that advance reduction is necessary in all circumstances. First, it presumes that every organization will always intentionally budget dues for some uses which are concededly nonchargeable. Certainly in the case of an organization which does do so, advance reduction is feasible and appropriate. In such a situation it is a simple matter to calculate the percentage of the dues budget which that sum constitutes and make an advance reduction. If, for example, an organization earmarks $10,000 for political campaign contributions within a $100,000 budget, an indisputably nonchargeable use, there would be no reason not to reduce an objecting member's dues in advance by 10%. However, advance reduction is not practicable when an organization does not intentionally budget for any concededly nonchargeable use. The Florida Bar is such an organization. The Florida Supreme Court has limited the Bar to legislative activities involving

> (1) questions concerning the regulation and discipline of attorneys; (2) matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency; (3) increasing the availability of legal services to society; (4) regulation of attorneys' client trust accounts; and (5) the education, ethics, competence, integrity and regulation as a body, of the legal profession,

and other issues only when it is determined:

> (1) that the issue be recognized as being of great public interest; (2) that lawyers are especially suited by their training and experience to evaluate and explain the issue; and (3) the subject matter affects the rights of those likely to come into contact with the judicial system.

The Florida Bar re Schwartz, 552 So. 2d 1094, 1095 (Fla. 1989). Accordingly, the Bar adopted a 1988-89 budget broken down into the following categories:

Lawyer Regulation
Unauthorized Practice of Law
Client Security Fund
Journal & News
Public Information
Public Interest Programs
Meetings & Conventions
Committees & Other Activities
Section Administration
Continuing Legal Education Programs
Legal Publications
Legislation
Administration

[Joint App., p. 62] None of these categories is a nonchargeable use per se, see *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), and the Bar is not able to determine in advance of dues collection what issues will arise during the budget year. The point is not that The Florida Bar will never expend dues for nonchargeable uses, but that it does not budget for such uses as a matter of policy. It is for this reason, in addition to the reason which follows,

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[3] In *Dashiell v. Montgomery County*, 925 F.2d 750 (4th Cir. 1991), a different panel from that deciding *Crawford v. Air Line Pilots Ass'n.*, supra, implied that advance reduction is necessary. Rehearing en banc was granted in *Crawford* in May 1989, but no opinion has been reported.

that The Florida Bar has chosen the alternative of an escrow rather than an advance reduction.

Even if Florida did elect to use dues for a nonchargeable purpose, it would not be practicable for it to utilize an advance reduction. As noted, The Florida Bar does not earmark funds for categories which are indisputably nonchargeable. The expenses which have historically drawn challenge and are likely to do so in the future are those in the legislative arena. The legislative process is a dynamic one. It cannot be predicted what issues will become prominent and what new issues will arise. The Bar may know that there will be some nonchargeable uses, but it cannot calculate an advance reduction if it has no way of determining in advance what proportionate share of dues will be allocated to those issues.

In its 1988-89 fiscal year, The Florida Bar budgeted a lump sum $320,247 for its legislative program.[4] The Bar knew in advance what a number of legislative issues would be and it might be argued that some of them would constitute indisputably nonchargeable uses. However, the Bar did not know, and could not have known in advance what the relative allocation of the budgeted funds to chargeable and nonchargeable issues was going to be.

In *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987), the Sixth Circuit suggested that an advance reduction could be calcula~~ted upo~~n a projected forecast based upon the percentage "traditionally expended" on chargeable and

[4] Joint Appendix, p.61.

nonchargeable uses.[5] Such a procedure is workable with an organization that has a stable relative allocation of funds between chargeable and nonchargeable uses from year to year. With an organization such as The Florida Bar, however, any effort to calculate an advance reduction based upon past budgets would be entirely arbitrary since the apportionment of The Florida Bar's budget one year affords no predictability as to future years.

The original circumstances leading to the filing of this action by Mr. Gibson provide an excellent example. He originally challenged a Bar position on a proposed amendment to the Florida Constitution. The issue arose within the Bar in March 1984, after the collection of dues for the budget which funded the Bar's activities in connection with the proposed amendment. Any "forecast", assuming that a meaningful one could have been made in the first place, would have been rendered meaningless by the unanticipated introduction of the proposed constitutional amendment after collection of dues.

In the case of unions such as those involved in *Ellis* and *Hudson* which collect dues by monthly or weekly payroll deduction, it would be theoretically possible (although administratively burdensome) to engage in a continuing audit and adjust the amount collected as allocation of the budget to various issues progresses throughout the year. This must be distinguished from The Florida Bar which collects a single annual dues payment. An advance reduction based upon Florida's previous year's allocation would necessarily be arbitrary. For this

[5] Id. at 1367 n.5.

Court to mandate such an arbitrary procedure would be to formulate a constitutional principle grounded on a legal fiction having no connection with reality.

In addition to the virtual impossibility of determining in advance the amount of allocation to different issues, advance reduction would also raise difficult administrative problems in the determination of which issues are chargeable and which are not. In *Keller v. State Bar of California*, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990), this Court dismissed the California Supreme Court's concern with the "extraordinary burden" of the Bar undertaking a "bill-by-bill, case-by-case *Ellis* analysis" by noting that such an analysis could be avoided if the Bar adopted the procedures described in *Hudson*. That would be true if the interest-bearing escrow account were sufficient to meet constitutional requirements. If, however, advance reduction is always necessary, then there would be no avoiding the necessity of the burdensome *Ellis* analysis decried by the California Supreme Court.

In *Abood*,[6] *Ellis* and *Hudson*, this Court sought to strike a reasonable balance between "preventing compulsory subsidization of ideological activity"[7] and permitting a union sufficient leeway to ensure that all members contribute their fair shares toward financial support of constitutionally justified activities. In doing so, the Court declined to impose a single procedure as the one true answer. In *Ellis* and *Hudson* the Court referred to

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[6] *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

[7] *Chicago Teachers Union v. Hudson*, supra at 302.

"readily available alternative such as advance reduction and/or interest-bearing escrow accounts".[8] In *Keller* the Court acknowledged the possibility that "one or more alternate procedures" to those outlined in *Hudson* might be acceptable.[9] Different organizations can be expected to have different budget priorities. Some will concentrate funds in activities, such as political campaigns, which are conducive to advance reduction. Others, such as The Florida Bar, will concentrate on activities such as legislation which are not suitable for advance reduction. The flexibility reflected in *Ellis*, *Abood* and *Keller* accommodates these different systems while protecting the rights of the dues payers.

Because The Florida Bar is unable to determine in advance what the relative allocation of dues will be, it escrows 100% of a dissenting member's pro rata share of the entire legislative budget in an interest-bearing account until an accurate determination can be made. The procedure fully and fairly accommodates both goals which this Court seeks to attain.

The exigencies of the legislative process are such that situations will inevitably arise where action by the Bar must be taken before the objection procedure has time to place a dissenting member's dues in escrow. This problem would exist as well with an advance reduction system if the issue is one which was not contemplated prior to dues collection. The Eleventh Circuit dealt with this

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[8] *Ellis v. Railway Clerks*, supra at 444; *Chicago Teachers Union v. Hudson*, supra at 304.

[9] *Keller v. State Bar of California*, supra at L.Ed.2d 16.

contingency by requiring that interest on escrowed funds be calculated from the date such dues are received by the Bar.[10]

Advance reduction is an option by which an organization may choose to meet its *Abood* obligations. However, the suggestion that advance reduction is mandated by the Constitution as the only accepted methodology rests on an invalid premise – that the *collection* of revenue alone implicates First Amendment rights. The issue focuses attention on the wrong end of the revenue procedure. This Court's concern in *Ellis*, *Hudson*, and *Keller* has been with *use* of dues revenues, not their *collection*. Thus, in *Hudson*, the Court quoted its earlier statement in *Abood* that:

> The objective must be to devise a way of preventing compulsory *subsidization of ideological activity* by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.

Hudson at 302. [emphasis supplied] In the absence of a due process or equal protection claim, or some other special "burden" on the exercise of free speech, which are not claimed here, this Court has never recognized the

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[10] Petition for Writ of Certiorari, p.14a. Since the Eleventh Circuit decision the Bar has amended its rules to provide for calculation of interest from the date of receipt of a dissenting member's annual dues payment. [Brief of Amicus Curiae Frankel and Little, pp. 62a, 64a.]

existence of a constitutional issue at the revenue *collection* stage.[11]

In *Damiano v. Matish*, supra, the Sixth Circuit opined that collection of compulsory dues without advance reduction would violate a member's First Amendment rights even if the disputed portion were immediately placed in an interest-bearing escrow account because "the dissenting employee could not use this property for his own preferred political, ideological or other elected purposes." *Id.* at 1370. The implications of such a holding by this Court are sobering. All revenue exactions deprive the payer of the ability to use the funds for his or her "own preferred political, ideological or other elected purposes." The repercussions of such a holding were discussed by Judge Kozinski in his dissenting opinion in *Grunwald v. San Bernardino School Dist.*, supra at 1230:

> Precedent joins common sense. The Supreme Court in *Chicago Teacher's Union, Local No. 1 v. Hudson*, * * * listed three – and only three – requirements a union must meet in a situation such as this. First, none of the money collected from the objectors may be used – even temporarily – for nonrepresentational purposes. Citing *Abood v. Detroit Board of Education* * * * , the

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[11] See *Leathers v. Medlock*, 59 U.S.L.W. 4281 (U.S. 1991); *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune v. Minn. Com'r of Rev.*, 460 U.S. 575 (1983). In *Abood* and *Hudson* this Court noted that "requiring nonunion employees to support their collective-bargaining representative 'has an impact upon their First Amendment interests' ". *Hudson* at U.S. 301. The Court's concern was presumably with the forced *association*, not the fact of revenue *collection*.

Court decried the "tyrannical character of forcing an individual to contribute even 'three pence' for the 'propagation of opinions which he disbelieves.' " 475 U.S. at 305, 106 S.Ct. at 1075. Here, the Union uses not a penny for nonrepresentational activities as 100% of the agency fee is safely tucked away in escrow. Thus, objecting employees do not suffer the injustice of having their money used to advance causes they abhor.

The only other first amendment harm plaintiffs suggest is that the $8 a month is not available to *them* for three (or seven months), so they are unable to use the money to exercise *their* first amendment rights. * * * If this argument were accepted, every suit for money against a party acting under color of governmental authority would automatically become a first amendment case. In any event, it is a type of harm that the Court in *Hudson* did not recognize.

[emphasis by Court]

II. THE REQUIREMENT THAT A PERSON OBJECTING TO THE USE OF COMPULSORY DUES INDICATE WHICH USES HE OR SHE BELIEVES ARE NONCHARGEABLE IS CONSTITUTIONAL, PROVIDED THAT THE OBJECTOR IS NOT REQUIRED TO DISCLOSE HIS OR HER PERSONAL POSITION REGARDING AN ISSUE

This Court has consistently adhered to the proposition that, while an organization collecting compulsory dues has the ultimate burden of proving that such dues are used for constitutionally chargeable purposes, the dues payer carries the initial "burden of raising an objection." *Chicago Teachers Union, Local No. 1 v. Hudson*, supra

at 306; *Abood v. Detroit Board of Education*, supra; *Machinists v. Street*, 367 U.S. 740 (1961). Petitioner argues, however, that the type of objection required by Florida Bar rules is constitutionally impermissible.

Florida Bar rules require that the Bar publish notice of adoption of legislative positions in The Florida Bar *News*, a twice-monthly official publication of the Bar, immediately following the board meeting at which the positions are adopted.[12] A member then has 45 days after the date of publication in which to file an objection. Upon receipt of an objection, 100% of the member's pro rata share of the entire legislative budget is immediately placed in an interest bearing escrow account. Petitioner complains that the procedure is defective for two reasons.

First, petitioner argues that the procedure is unduly burdensome because it requires him to monitor The Florida Bar *News* on a continuing basis and to file a separate objection as to each position. The fallacy of the argument is that the rule places no greater monitoring burden upon the petitioner than he would have if he were permitted to make a general objection. Unless the petitioner were willing to grant to the Bar the unilateral right to determine which issues are within the chargeable scope of compulsory dues use and which are not (an unlikely probability), the petitioner would still have to monitor all positions subsequently taken to decide whether he agrees with the Bar's determination.

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[12] Petition for Writ of Certiorari, App. 6a.

Petitioner argues that the Bar cannot require more than "a standing objection to all nonchargeable exactions".[13] Just as with the advance reduction, such an objection would be unworkable in actual application. The petitioner's demand for a standing general objection presumes that there is a concrete standard against which all uses can be easily judged as chargeable and nonchargeable, and that exercise of the Bar's responsibility is a simple matter of properly designating each use according to that standard. This Court's opinion in *Keller v. State Bar of California*, supra, and its own experience in *Lehnert v. Ferris*, 1991 U.S. Lexis 3017 (1991), illustrate that there is no concrete standard. In *Keller* the Court noted that some activities will fall at the "extreme ends of the spectrum" and be easily identifiable as germane or non-germane, but that the proper categorization of others "will not always be easy to discern." *Id.* at L.Ed.2d 15. In *Lehnert* the Court expressed divergent views as to the appropriate test for determining whether an expenditure is or is not germane and as to the proper classification of particular expenditures. Particularly in the legislative arena, most issues are likely to fall between "the extreme ends of the spectrum" where men and women of good faith can fairly differ.

Again, the circumstances giving rise to this case are illustrative. The petitioner challenged the Bar's announced intention to take a position on a proposed amendment to the Florida Constitution which would

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[13] Brief of Petitioner, p. 19.

have several limited the State's ability to raise revenue.[14] If the Bar had limited its activities to informing the public of the impact which the amendment would have had on the functioning of the judicial process, would such activity been germane to the State's interest in "improving the quality of legal services"? *Keller v. State Bar of California*, supra at L.Ed.2d 14. The obligation of a member to designate which activities or issues he or she believes to be nonchargeable is a reasonable requirement which sets in motion the mechanism to fairly resolve the question.

The only alternative to the Bar's current objection procedure would be to permit an objector such as the petitioner to file a single nonspecific objection which would automatically impose upon the Bar the alternative of either rebating 100% of the objector's pro rata share, regardless of the merit of the objection (an unfair result for other dues paying members), or sending every issue to costly arbitration. This is apparently the procedure which the petitioner seeks when he refers to "a standing objection to all nonchargeable exactions."

Petitioner asserts that the foregoing argument by the Bar is "disingenuous" because the petitioner has the ability to place the Bar in the same position under the current rules simply by filing an objection to every position. This, the petitioner concludes, shows that the Bar's preference for specific objections "can only be for the purpose of

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[14] See *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984).

discouraging dissent."[15] In fact, the Bar is motivated by an entirely different and completely legitimate consideration. Florida Bar rules allow the Bar to elect either to rebate an appropriate pro rata share of a dissenting member's dues or to send the issue to arbitration. Knowing how many members have objected to a particular position provides the Bar with the information necessary to rationally judge whether arbitration is economically or ideologically justified.[16]

The context in which petitioner discusses the Bar's motivation is ironic. Neither the Bar nor this Court has reason for concern over a member who is going to object to every position, regardless of the member's true belief in the merit of such objection, solely for the purpose of forcing the Bar to return dues or go to arbitration. Rules should not be written to accommodate those who would act in bad faith. For the purpose of formulating such rules, it should be presumed that a member would object only to those positions which the member honestly believes in good faith constitute nonchargeable uses.

There is an additional reason for the Bar's procedure which is directly related to the underlying purpose for its existence. The procedure is intended to protect members

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[15] Brief of Petitioner, p.20.

[16] The Bar has thus far elected to rebate 100% of pro rata shares to objecting members because the minutely small percentage of members filing objections on each issue indicated that there was not a strong ideological dispute and arbitration would have been an unnecessary expense. In the case of the positions cited by amicus curiae Frankel and Little, for example, only 9 members out of 45,166 (.019%) filed objections. [Brief of Amicus Curiae Frankel & Little, App., p. 38a]

from the imposition on their First Amendment rights that would be occasioned by the compelled financial support of political or ideological ideas with which they may disagree. Even though a member believes that a particular expenditure is nonchargeable, he or she may elect to voluntarily support the position and, consequently, not object. If, after reasonable notice to all members of a particular use of dues, no objections are filed, the Bar may reasonably presume that the use does not politically or ideologically offend any members and does fairly reflect the consensus of the membership.

Petitioner's second contention regarding the objection procedure is that the requirement for a specific objection forces him to disclose "his own position concerning the legislative policy at issue" contrary to the dictates of *Abood*. In support of this position, amicus curiae Pacific Legal Foundation cites the line of cases commencing with *National Association for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958) which hold that the First Amendment protects against compelled disclosure of political associations. The anonymous association cases are not analogous to the case at bar. Disclosure of affiliation with a political or ideological organization necessarily discloses a person's beliefs. The Florida Bar rule, on the other hand, does not require the objector to disclose his or her position regarding a particular issue, only a belief that the issue is outside the scope of chargeable use of compulsory dues. Such an objection does not disclose a person's "political or ideological opinion" and is no more likely to engender animosity than a single standing

objection.[17] It was recognition of this important distinction which led the Eleventh Circuit to reject petitioner's argument:

> As the Supreme Court has stated, the dissenter "has the burden of raising an objection." * * * This burden "is simply the obligation to make his objection known." * * * The affirmative objection requirement here is within the scope of this obligation. It merely requires the objector to inform the Bar that he objects to the Bar's use of compulsory dues to support a given legislative policy. Beyond that, the objector need not provide any further information concerning the motivation for his objection or his own position concerning the legislative policy at issue. We therefore reject Gibson's challenge on this point.

Gibson v. The Florida Bar, 906 F.2d 624, 632 (11th Cir. 1990).[18]

If this Court intended to mandate the type of generalized, continuing objection envisioned by the petitioner, there would have been no reason for the requirement that the Bar provide members with reasonably detailed information regarding the breakdown of expenditures prior to the member having to file an objection. Such a requirement is implicitly based upon the assumption that the

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[17] As noted, a member may believe that a particular expenditure is nonchargeable and nevertheless choose to voluntarily support the activity and not object. Conversely, the filing of an objection does not signal the member's ideological position on an issue since some members may object to the use of dues for nonchargeable purposes regardless of whether or not they agree with the position.

[18] Petition for Certiorari, App. 15a.

member requires the information in order to make a rational decision regarding objection on an issue-by-issue basis. Since the Bar carries the burden of proof after an objection is made, there would be no reason to require provision of detailed information *before* a general standing objection.

This case does not involve protection of the petitioner's constitutional rights. Those rights have been adequately protected since this Court's decisions in *Ellis*, *Hudson*, and *Keller*. The relief which petitioners now seek would trivialize the significant rights defined in those cases by elevating individual convenience to a fundamental right.

III. THE FLORIDA BAR'S PROCEDURES FOR PROVISION OF INFORMATION REGARDING USE OF COMPULSORY DUES MEET CONSTITUTIONAL STANDARDS

Petitioner and amicus each make reference to alleged inadequacies in the Bar's notice and identification of dues expenditures. Such allegations are based on *Hudson*'s discussion that, for purposes of collecting proportionate share payments via a union's advance reduction/payroll deduction scheme, potential objectors be given sufficient information to gauge the propriety and sources of any agency fee calculation. Further, the union in *Hudson* had not provided nonmembers with a complete breakdown of all expenditures; only a recitation of expenditures not chargeable to nonmembers' dues was provided. Nevertheless, even in the context of *Hudson*'s periodic payroll deduction scheme, this Court noted:

> The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor.

Chicago Teachers' Union, Local No. I v. Hudson, 106 S.Ct. 1066 at 1076 n. 18. In contrast, The Florida Bar collects its annual member dues in one payment, based on a budget formulated through an open and participatory process. The proposed budget and each successive draft is published for the entire membership and meetings of the budget committee are fully noticed to the member ship.[19]

This Court, in *Keller*, acknowledged the difficulty in categorizing matters as either within or outside the constitutional purview for compulsory dues funding:

> Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy discern.

Keller v. State Bar of California, supra at 2237. With an appreciation of the difficulty in precisely discerning "where the line falls" within various legislative matters – and following the admonition of our parent court to avoid

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[19] Rules relating to budgeting procedures were adopted as an opinion of the Florida Supreme Court. *The Florida Bar re Rules Regulating The Florida Bar*, 949 So. 2d 977 (Fla. 1986). See Rules 1-7.1, 2-6.1 through 2-612.

divisive issues[20] – The Florida Bar's procedures call for the formal notice of all legislative positions taken by it in order to totally accommodate member dissent. As soon as the Bar's formal legislative program takes shape, the entire membership is immediately apprised of all there is to know about it ideologically and financially. Such information is prominently featured – as an official Bar notice and precisely quantified as to its dues impact – in The Florida Bar *News*.

All Bar finances are audited by an independent accounting firm. The Bar calculates each member's pro rata share of the financial support of legislative activities, in their entirety. The complete legislative function is deemed to be funded exclusively by member dues in order to vitiate any questions about the integrity of this calculation. The cost per member of the Bar's full legislative program is published in the annual directory issue of The Florida Bar *Journal* and provided to every member as a potential maximum dues reimbursement figure.

Following the forma! year-end audit of Bar activities by a certified public accountant, the independently verified portion of Bar dues attributable to any contested legislative activity – not some amount of arguable accuracy based on prior experience – is rebated to all dissenting members, together with interest from the date received, calculated at the statutory rate on judgments.

The Florida Bar does not, as did the union in *Hudson*, leave the membership "in the dark about the source of

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[20] *The Florida Bar re Schwarz*, 552 So.2d 1094, 1097 (Fla. 1989).

the figure" for dues, and does not, as did the union, require members to object in order to receive information. Finally, unlike the union in *Hudson*, the Bar does not limit the membership to information about admittedly nonchargeable expenditures. The Bar provides its members with full information on *all* budgeted expenditures. Petitioner complains that the information is nevertheless inadequate because it does not classify the budgeted amounts as chargeable and nonchargeable and does not provide the percentage of dues apportioned to each. The procedure called for is just as problematic as advance reduction. The Bar could be compelled to force its budget into an artificial mold in which it assigns fictitious percentages to various categories, but what purpose would be served? A member now has sufficient information to formulate an opinion as to whether the Bar is properly using his or her dues, and those dues are fully protected until final resolution in the event of an objection.

Petitioner asks this Court to bind all organizations which utilize compulsory dues or agency fees in a procedural straight jacket. There is nothing constitutionally sacrosanct about advance reduction. This Court should permit sufficient leeway for organizations to develop procedures which sensibly meet their particular circumstances while meeting constitutional standards.

IV. THERE IS NO RECORD UPON WHICH THIS COURT CAN DETERMINE WHETHER OR NOT THE PETITIONER IS ENTITLED TO A REFUND

The petitioner asserts that the Circuit Court erred in failing to order a refund of an appropriate portion of dues payments made by petitioner. The lower court was

correct in declining to order a refund and this Court should do the same because, regardless of this Court's holding, the record from the trial court is insufficient to establish whether or not the petitioner is entitled to a refund.

The petitioner challenged the use of his dues in connection with a proposed amendment to the Florida Constitution in 1984. No judicial determination was ever made of the amount of dues, if any, spent on the issues or the pro rata share of petitioner's dues which such expenditures would have accounted for.[21] In addition, no determination has ever been made by the trial court or any impartial decisionmaker whether or not the use of dues in connection with the proposed amendment was germane to the Bar's constitutionally justified purpose and therefore chargeable. Even if this Court were to rule against the Bar, it would be necessary to remand to the trial court for determination of those issues.

The Eleventh Circuit declined to reach the issue of retroactive damages in the form of a refund because petitioner did not request such damages in his complaint or present any evidence related to it at trial or on remand. Petitioner responds that after making his objection, the burden of proof shifted to the Bar, that past decisions of

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[21] In its first opinion in this case, the Eleventh Circuit noted testimony that "each lawyer's share of the lobbying budget amounts to approximately $1.50." Petition for Writ of Certiorari, p. 34a. No finding was ever made by the trial court respecting the amount and, in any case, the $1.50 figure represented the petitioner's pro rata share of the *entire* legislative budget, not the amount allocated to the proposed amendment, the only issue which he challenged.

this Court indicate that a general claim for relief is sufficient to support a refund, and that he tried to raise the issue several times at the trial level. Petitioner misses the point.

This Court has indicated that a general claim is sufficient and consequently the Bar would not suggest that petitioner has waived his right to claim a refund simply because it was not specified in the ad damnum clause of his complaint. However, petitioner has an obligation to raise the issue at some appropriate point in the trial court so that respondents have a fair opportunity to raise available defenses, such as qualified immunity, and so that an evidentiary record can be created. The petitioner did mention the issue of damages on several occasions in the trial court, but never under circumstances calling for a response by the Bar or specific action by the trial court. The point is that he may be entitled to have the question heard, but not at the appellate level.

CONCLUSION

The Florida Bar respectfully urges that the decision of the Eleventh Circuit be affirmed.

Respectfully submitted,

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